(d) the likelihood that the enjoyment of the plaintiff's sexual intercourse will be affected by psychological and emotional effect; (e) the pain in the penile scar during sexual intercourse; (f) the ugly scars on various parts of the body and (g) the occasional pain in the penile scar when not performing sexual act, backache and itchiness of the scar on the abdomen. In its final assessment the court shall however bear in mind the element of overlapping. Three cases have been cited for the court to consider and they are as follows — (1) *Esah binte Pa'at & Anor.* v. *Changi Bus Co. Ltd.*;[1] *Tan Guan Cheng & Anor.* v. *Kuala Lumpur, Klang & Port Swettenham Omnibus Co. Ltd.*[2] and *Chua Kim Liang & Anor* v. *Teo Kim Ngo.*[3]

Esah's case seems relevant only in so far as the multiple injuries received by the plaintiff.

Tan Guan Cheng's case was decided by me. In that case a schoolboy aged 8 had pelvis fracture and ruptured urethra and there was likelihood that he would be impotent and sterile. I awarded $20,000 as general damages. It may be distinguished from the present case in that here the plaintiff is, according to the medical report, sterile and will not be able to father a child.

In the case of *Chua Kim Liang* a sum of $25,000 was awarded. In that case it is shown that the plaintiff suffered some derangement of his sexual functions — namely, attempts to perform sexual act causes the plaintiff pain and produces psychological consequences. To my mind the decision in that case seems pertinent in particular in regard to the psychological and emotional effect upon the plaintiff's enjoyment of his sexual act.

In my view the injuries received by the plaintiff, the consequential effect of these injuries upon the plaintiff and also the extensive ugly scars found on the body of the plaintiff are slightly more severe than those sustained by the plaintiff in *Chua Kim Liang's* case. Nonetheless I feel that in a case such as this it is impossible to accurately assess the fullest extent of pain and suffering and for that matter to express with certainty that the injuries received by a claimant in one case can precisely be compared with the injuries received in another case.

In the final analysis it is my considered judgment that taking into account the overall picture judged in the light of the *Chua Kim Liang's* case, a sum of $27,500 would provide a fair and reasonable compensation. I would therefore enter judgment for the plaintiff in the sum of $27,500, interest at 6% per annum with effect from the date of service of the writ and costs.

Judgment for the plaintiff.

Solicitors: *Segaram & Co.; Khoo & Sidhu.*

PUBLIC PROSECUTOR v. TUNKU MAHMOOD ISKANDAR

[O.Cr.J. (Abdul Hamid J.) April 17, 1977]
[Johore Bahru — Criminal Trial No. 13 of 1977]

Criminal Law and Procedure — Culpable Homicide not amounting to murder — Plea of guilty — Sentence — Equality under the Constitution — Rule of Law — Penal Code, s. 304.

In this case the accused, a member of the Johore Royal family, was charged with an offence under section 304 of the Penal Code. He pleaded guilty.

Held: (1) in considering the appropriate sentence the court must consider the facts surrounding the particular incident and take into account the conduct of both the accused and the deceased;

(2) after full consideration of the facts and surrounding circumstances and relevant mitigating circumstances, the sentence that shall be imposed is imprisonment for six months and a fine of $6,000 or in default six months' imprisonment.

CRIMINAL TRAIL.

Abu Talib Othman (Senior Federal Counsel) for the Public Prosecutor.

Datuk P. Suppiah for the defendant.

Abdul Hamid J. (delivering oral judgment): The accused is charged with the commission of an offence under section 304 of the Penal Code. Upon this charge he has pleaded guilty and he fully understands the nature and consequences of his plea. The facts in so far as they relate to the commission of this offence have been produced before the court and the accused fully admits them without qualification. I accept his plea of guilty and accordingly I convict him to the offence charged. It now remains for this court to sentence the accused.

I have heard the plea in mitigation made by Datuk P. Suppiah on behalf of the accused. He submitted at length and all mitigating factors have been put forward before this court.

I also have before me the facts given by the prosecution and all relevant facts have been submitted including all the circumstances surrounding the incident.

While it is clearly established that the death of Teo Ah Bah was caused by the accused, it is also revealed that there was evidence to show that at the material time commission of a criminal act by the deceased was in progress. It is also revealed that there were charges under the Customs Act pending against the deceased. The nature of these charges appears to relate to the deceased's purported criminal activity.

This observation is not to be construed as an assumption of guilt of the deceased and neither must it be deemed to be a judicial pronouncement upon the charges previously instituted against the deceased for to do so would be to condemn a man guilty before he is tried. And by the same token it certainly is not the intention of the court to acknowledge that the accused was fully justified in doing what he did. I would surmise that these factors have been disclosed to enable the court to fully appreciate the relevant circumstances leading to and surrounding the incident upon which the defence counsel has urged me to consider them in determining the sentence the court

shall impose. The plea in mitigation seems to imply that the accused was exercising a right given under our law to a private person to arrest. There is such a right recognized by law but I must promptly correct any misconception that the law confers on any person absolute authority to act in excess of a citizen's right of arrest, i.e. irrespective of whether in so doing he acted carelessly or upon erroneous supposition of the existence of such right, or had caused harm. If any individual should exceed such right by doing an act which offends the penal law he must abide by the consequences of his act.

The plea in mitigation further implies that the accused acted in good faith. It is settled principle that to satisfy the court of good faith, a person must show that he acted advisedly and that he had reasonable grounds for believing that he ought to do what he did. To my mind it is insufficient, even conceding the accused had initially proceeded to act in good faith, to hold from the facts and circumstances surrounding, that when he fired the shot that resulted in the death of the deceased the accused had in fact proceeded with due care and attention. Moreover, considered with reference to the general circumstances, the capacity, position and intelligence of the accused, the validity of his conduct is definitely open to question.

The offence committed by the accused seems to fall under this second limb of section 304 which provides that whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to ten years or with fine or with both where the act was done with knowledge that it was likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death.

Let me make it abundantly clear that I have, in view of the circumstances of the present case, given considerable thought to the concept of equality before the law as enshrined under our Constitution. It bears great significance and the court as guardian of the law must not lose sight of it. There is always an inherent danger that the concept would lose its significance if persons brought before the court are treated discriminately. It is upon this fundamental entrenchment of the basic right, namely, all persons are equal before the law, that lies the strength of our system, the dignity and resourcefulness of our people and the independence of our Judiciary. With equality there is, I concede, the corresponding right or entitlement to equal protection of the law. Viewed upon such premises I find the institution of a prosecution against the accused before a Court of Justice an affirmation, indeed a testimony of our firm conviction in the rule of law. It is not my intention to preach or offer advice to the accused but to emphatically create awareness in his mind that there is a lesson to be learnt, that in a country where we take comfort in an excellent Constitution, where the rule of law prevails, no man can act in disobedience to and conceivably claim that he can take the law into his own hands.

In consideration of what I have stated and after careful analysis of the circumstances allowing not the slightest bit the position of the accused to press upon my judgment, it is my view that the sentence of this court shall be commensurate with the criminal conduct of the accused.

The sentence I am about to pass should reflect the seriousness with which this court has viewed the offence committed. I have in considering the appropriate sentence seriously applied my mind to the facts surrounding this particular incident and have necessarily taken into account the conduct of both the accused and the deceased. It is disquieting to note that the accused had rashly disregarded the value of human life even though he is justified in claiming that he had good reason to believe that the deceased himself was engaged in some criminal activity.

I do accept that certain mitigating factors exist. I accept the accused had no intention to cause death but lack of intention has been accounted for by the very fact that the accused now faces a lesser offence of culpable homicide not amounting to murder. I also accept that the accused is entitled to rely upon them, indeed the court shall consider them in his favour in imposing the sentence. Be that as it may, it is settled principle that in considering the appropriate sentence it is of paramount importance that public interest must be considered. In this regard and in the light of the circumstances of the instant case, it must be borne in mind that justice must not only be done but must manifestly be seen to be done.

It is after giving full consideration to the facts and surrounding circumstances and relevant mitigating factors that this court sentences the accused to six months' imprisonment and fine $6,000 in default six months' imprisonment.

Order accordingly.

Solicitors: *Suppiah & Singh.*